STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 23, 2014
v	No. 317248 Wayne Circuit Court
KEVIN DESHAWN MATLOCK, Defendant-Appellant.	LC No. 13-001250-FC

Before: FITZGERALD, P.J., and WILDER and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of felony murder, MCL 750.316(b), and assault with intent to commit murder, MCL 750.83. He was sentenced to life in prison without the possibility of parole for the felony murder conviction and to 15 to 60 years in prison for the assault conviction. We affirm.

I

Defendant's convictions arose from his attempted robbery of marijuana and money from Max Hunter (also known as the "Kush man"). Hunter had been selling marijuana to defendant for about two years, and defendant had visited Hunter's residence on five or 10 occasions. Hunter testified that he sometimes had a gun on the table near him for protection.

According to Hunter, on the day of the attempted robbery, defendant called him to buy marijuana, and about 20 minutes later, defendant called again to say that he was outside. Defendant told police that he and his brother-in-law, Tyjuan Stewart,[1] who was armed with a semi-automatic handgun, planned to grab Hunter and then rob him. Defendant further explained that, when they arrived at Hunter's house, defendant saw a "young guy" (Brandon Collins) with a gun and "tried to warn [Stewart], no," but Stewart stepped around defendant and shot Hunter. As defendant ran for the front door, he saw Stewart and Collins struggling and then defendant heard a second shot. Collins suffered a fatal gunshot wound to the back of his head. Defendant told police that he jumped into the driver's seat of the car, Stewart entered the car on the passenger's side, and defendant drove them away.

[1] Hunter testified that he had never seen Stewart before.

II

On appeal, defendant argues there was insufficient evidence to convict him of either felony murder or assault with intent to murder and he was therefore denied his constitutional right to due process.

Constitutional questions are also reviewed do novo. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001); *People v Swint*, 225 Mich App 353, 364; 572 NW2d 666 (1997). When reviewing a claim of insufficient evidence, this Court reviews the record de novo. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). This Court reviews the evidence in the light most favorable to the prosecution and determines if a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012).

The elements of felony murder are:

> "(1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in" the statute. *People v Nowack*, 462 Mich 392, 401; 614 NW2d 78 (2000); MCL 750.316(1)(b).

To support a conviction for assault with intent to commit murder, the prosecutor must prove that there was an assault with an actual intent to kill, which had the assault been successful, would have been murder. *People v Abraham*, 234 Mich App 640, 657; 599 NW2d 736 (1999); *People v Lugo*, 214 Mich App 699, 710; 542 NW2d 921 (1995). Defendant only argues that the prosecutor failed to prove the requisite intent.

Defendant's intent could be inferred from the plan to commit a robbery with a gun and the facts and circumstances surrounding that attempted armed robbery. See *People v Kissner*, 292 Mich App 526, 534; 808 NW2d 522 (2011) ("A fact-finder may infer a defendant's intent from all the facts and circumstances."). A reasonable jury could infer from Hunter's testimony that defendant devised an armed robbery, knowing from past drug purchases that Hunter could be armed and the deadly use of a gun would be necessary overpower him, steal the marijuana, and escape a place where defendant's identity was known. When defendant and Stewart arrived at Hunter's residence, Collins was armed, Stewart struggled with Collins, two shots were fired, and Collins died as a result of a gunshot wound to the back of the head. Although defendant claimed he abandoned the plan to commit the armed robbery when he saw Collins with the gun, he nevertheless helped Stewart flee by driving him away from the house after the shooting. See *People v Feldmann*, 181 Mich App 523, 533; 449 NW2d 692 (1989) (holding that where a defendant may not have initially intended for his codefendant shoot the victim of a planned robbery, there was sufficient evidence for a felony murder conviction if the defendant became aware of the intention to kill at some point during the robbery). Taking all of the evidence in the light most favorable to the prosecution, sufficient evidence existed for a finding that defendant possessed the requisite intent to commit felony murder or assault with intent to

commit murder. Thus, defendant has failed to establish a reason to set aside his convictions based on insufficient evidence of intent.

III

Defendant next argues that the trial court erred in giving the standard jury instruction regarding flight, CJI2d 4.4, and that he was subsequently denied a fair trial where the evidence did not support the inference that he fled from the scene to avoid detection or because of consciousness of his guilt. Defendant maintains "he merely left the scene." We disagree.

We review a defendant's claim that he was deprived of his constitutional right to due process de novo. *People v Steele*, 283 Mich App 472, 478; 769 NW2d 256 (2009). Claims of instructional error are reviewed de novo, but a trial court's determination whether a requested instruction is applicable given the facts of the case is reviewed for an abuse of discretion. *People v Hartuniewicz*, 294 Mich App 237, 242; 816 NW2d 442 (2011). The instructions "must include all elements of the charged offense and must not exclude material issues, defenses, and theories, if there is evidence to support them." *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994).

Evidence of flight, escape or concealment is usually admissible to show a defendant's state of mind or consciousness of guilt. *People v Cammarata*, 257 Mich 60, 66; 240 NW 14 (1932); *People v Compeau*, 244 Mich App 595, 598; 625 NW2d 120 (2001). For there to be evidence of "flight" in the legal sense, there must be some evidence that the defendant "feared apprehension" when he left the scene. *People v Hall*, 174 Mich App 686, 691; 436 NW2d 446 (1989).

In his statement to police, defendant stated that he "jumped off the front" and "ran" to the car when Stewart shot Collins. Defendant did not call for help for the victims or attempt to subdue Stewart. Instead, he drove Stewart away and was not present when the police arrived shortly after the shooting. Defendant's actions, particularly his rapid flight with the shooter, support a reasonable inference by the jury that he feared apprehension and fled from the scene before the police arrived out of consciousness of guilt. Although defendant turned himself in to police the day after the incident, he did so after they were already looking for him. Further, while "[f]light can result from factors other than guilt, . . . it is for the jury to determine what caused defendant to flee." *People v Taylor*, 195 Mich App 57, 63; 489 NW2d 99 (1992). In light of the evidence supporting a flight instruction, the trial court's decision to provide the instruction did not constitute an abuse of discretion or violate defendant's due process right to a fair trial.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder
/s/ Donald S. Owens